IN THE SUPREME COURT
STATE OF MICHIGAN
APPEAL FROM THE MICHIGAN COURT OF APPEALS

TOTAL PETROLEUM INCORPORATED,
Self-Insured,

Defendant-Appellant,

v

JEFFREY L. FRAZZINI,

Plaintiff-Appellee,

and

AAA OF MICHIGAN,

Intervening Plaintiff-Appellee,

Supreme Court Case No. 119362
Court of Appeals No. 223684

Lower Court: WCAC
Docket No: 98-000260

REPLY BRIEF OF APPELLANT TOTAL PETROLEUM

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INTRODUCTION

Pursuant to MCR 7.306 and MCR 7.309, the Appellant, Total Petroleum, Inc. ("Total Petroleum") files its reply brief. This appeal concerns a question of statutory interpretation of Section 301 of the Michigan Workers' Disability Compensation Act, MCL 418.301(1); MSA 3.550(101). A claim for compensation under the Act must satisfy two elements – It must arise out of employment and it must be in the course of employment. When an employee receives a personal injury arising out of a personal risk, even though in the course of employment, that injury does not satisfy the" arising out of" language and thus is not compensable under the statute. The Michigan Supreme Court has unequivocally affirmed this interpretation of the statute in *Van Gorder v Packard Motor Car Co*, 195 Mich 588; 162 NW 107 (1917).

The Plaintiff-Appellee and Intervening Appellee, AAA of Michigan, assert a number of arguments in their Appellee Briefs, which deride or obfuscate Section 301's two prong test for workers' compensation benefits. Only three merit some rejoinder. First, the Appellees' argument that *Van Gorder* should be ignored, because it represents a long discredited "accidental" analysis, completely misconstrues *Van Gorder* and introduces a meaningless distraction from the key issue involved with this case -- the application of the "arising out of" element in Section 301. Secondly, contrary to the Appellees' contention, while the WCAC decisions are reviewed de novo on questions of law, this does not nullify the Michigan Supreme Court's comments that some deference is owed to the Appellate Commission on its determinations, even of law. Lastly, the Appellees' arguments continue to cling to an incorrect analysis of the *Ledbetter* precedent.

ARGUMENT

1. *Van Gorder* is Still Valid Law

The Appellees contend that the *Van Gorder v Packard Motor Car Co*, 195 Mich 588; 162 NW 107 (1917) decision has no value because it relied on an "accidental injury analysis." Thus, according to the Plaintiff-Appellee, *Van Gorder* offers no meaningful guidance on Section 301 which only requires a claimant to "receive an injury arising out of employment." This argument completely misconstrues the *Van Gorder* holding. *Van Gorder*'s holding and analysis hinged on the meaning of "arising out of," not the fact that the incident involved an accident.

In the first place, the present version of Section 301 is not materially different from the version of Section 301 that existed in 1917 when *Van Gorder* was decided. Originally, the statute stated that:

> If an employee **receives a personal injury arising out of** and in the course of his employment by an employer subject to this Act, he shall be paid compensation in the manner and to the extent hereinafter provided. 1912 (1st Ex Sess) PA 10.[1] (emphasis added).

Therefore, *Van Gorder* dealt with a version of the causation statute which contained the "receiving personal injury" phrase.

Secondly, the incident in *Van Gorder* involved an accident in the normal sense of the term. The injury resulted from a fall off a platform. There was no dispute over this fact. Moreover, a

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[1]This version of the statute is also noted in the recent Michigan Supreme Court case of *Robertson v Dalhmer Chrysler Corp*, _____ Mich _____; 641 NW2d 567, n1 (2002). The initial version of the Workers' Compensation Statute, compiled at 1915 CO5431 provided in part:

> If an employee . . . receives a personal injury arising out of and in the course of his employment by an employer . . . he shall be paid compensation in the manner and the extent hereafter provided . . .

cursory reading of *Van Gorder* discloses that the Michigan Supreme Court was not preoccupied with the definition of "accident;" Instead, it was concerned with the issue of causation as meant by the phrase "arising out of." In this regard, the Michigan Supreme Court stated in *Van Gorder*:

> It is within the province of the court in its duty to determine whether, upon the facts found, the injury arose out of and in the course of employment. There is no question but that the decedent received his injury in the course of employment. We therefore passed the controlling question in the case, viz: Did the injury arise out of the employment? Was it an incident of the employment, due to it, or proceeding from it? Was there a causal connection between the injury and the employment? 195 Mich at 591.

In *Van Gorder* the Michigan Supreme Court answered these questions in the negative. The Court concluded that the employee's death, from his fall off a scaffold, was caused by his predisposition to epilepsy. His epileptic fit, not the platform, was the cause of his injury. *Id* at 597.

In the facts here, the Plaintiff-Appellee's act of operating a motor vehicle did not cause his injury. The act of driving a motor vehicle did not cause his diabetes or cause his hypoglycemic reaction. The direct and immediate cause of his accident was his personal medical condition. Consequently, based on *Van Gorder*, the Plaintiff-Appellee **did not** receive an injury arising out of his employment.

The Appellee wrongfully contends that the Michigan Supreme Court decision of *Sheppard v Michigan National Bank*, 348 Mich 577; 83 Nw2d 614 (1957), tacitly overruled *Van Gorder*. First, *Shepard* never discusses or even mentions the *Van Gorder* case. The facts of *Sheppard* involved a back strain caused by work which involved repetitive lifting and handling of trays weighing approximately 25 pounds. *Id* at 578. However, *Shepard* did address the issue of an accident in relationship to repetitive motion and strain type compensable events. *Shepard* did not

discuss the "arising out of" language. *Shepard* did not abrogate the "arising out of" requirement of Section 301.

Indeed, as indicated by the recent case of *Robertson v Dalhmer Chrysler Corp*, _____ Mich _____; 641 NW2d 567 (2002), the "arising out of" element of Section 301 does have significance. In that case, which involved the causation standard for a work related mental injury, Justice Markman, writing for the majority opinion commented:

> It would be inconsistent with this purpose to award compensation to those who injuries were merely coincident with the period of employment, but whose injuries did not arise out of that employment. *Id* at n11.

The Appellees concentrated attention on the phrase "receives a personal injury" is a diversion. This phrase existed in *Van Gorder,* and it has existed since the Act's inception. The true focus of this case belongs on the "arising out of" phrase. If causation in Section 301 is triggered merely by receiving an injury during employment, (as Plaintiff-Appellee argues), then the "in the course of employment" language is redundant. The Plaintiff-Appellee's argument wrongfully attempts to nullify Section 301's two-step analysis for awarding benefits.

2. <u>The Michigan Court of Appeals' Decision Showed No Administrative Deference</u>

It is true that matters of statutory interpretation of the Workers' Disability Compensation Act are questions of law. Appellate courts can review questions of law under a de novo standard of review. *See Robertson v Dalhmer Chrysler Corp*, 641 NW2d 567, *supra, Dibendedetto v Westshore Hospital*, 461 Mich 394, 401; 605 NW2d 300 (2000). However, the Michigan Supreme Court also commented in *Holden v Ford Co*, 439 Mich 257, 268-269; 484 NW2d 227 (1992), and again in *Mudel v Great A&P Tea Co,* 462 Mich 691; 614 NW2d 607 (2000), that appellate review is to be

extremely differential toward the WCAC. In *Holden*, the Michigan Supreme Court stated: "Due deference should be given to the administrative expertise of the WCAC." The context of these pronouncements related to the overall standard of appellate review. They were not restricted to WCAC factual finding.

The Appellees' argument that a question of law repudiates any deference owed the WCAC is incorrect. The fact that an issue represents a statutory interpretation and question of law does not obliterate all deference that may be owed to the WCAC and its administrative expertise.

3. The Michigan Court of Appeals Decision Misapplied the *Ledbetter* Case

Both the Appellee and the Intervening Appellee contend that the Michigan Court of Appeals correctly applied the case of *Ledbetter v Michigan Carton Co*, 74 Mich App 330; 253 NW2d 753 (1967). Plaintiff-Appellee attempts to defend the Court of Appeals decision, arguing that the WCAC wrongfully focused attention on whether the job activity increased the risk of injury. Instead, the Plaintiff-Appellee contends the focus is on whether the job activity increased the injury.

What both the Court of Appeals and the Appellee refuse to acknowledge is that the injury in *Ledbetter* was extremely serious. In fact, it resulted in the employee's death. *Id* at 332. Consequently, the *Ledbetter* analysis did not focus on the severity of injury.

The Appellees' emphasis on increased injury over increased risk highlights the fallacy of the Court of Appeals decision.[2] Focusing on the issue of injury betrays the "arising out of" language in the statute. This was aptly illustrated in *Van Gorder*. The Michigan Supreme Court in *Van Gorder*

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[2]Justice Markman commented about the issue of risk in *Robertson*. A risk analysis provides the employer an opportunity to take reasonable precautions in an effort to protect an employee from unsafe or threatening working conditions. *See Robertson*, Footnote 7.

was especially critical of an analysis which focused on the injury as opposed to the cause of the accident. "To so hold would be practically to announce a doctrine that the injury itself was its proximate cause." 195 Mich at 591.

It is not the injury that causes the accident. Neither did the act of driving an automobile cause the accident. The accident was caused by the employee's own personal medical condition which did not arise out of the employment or activity of operating a motor vehicle.

In this crucial respect, the Court of Appeals' decision here conflicts with the *Ledbetter* analysis. *Ledbetter* applied an employment related risk analysis:

> If it cannot be said with certainty that an accident would be less serious had it occurred away from work, then the idiopathic accident is not compensable under Act. 74 Mich App at 337.

In *Ledbetter*, the fact that the decedent fell on a concrete floor did not form a sufficient basis for causation, even through he eventually died from his injury. It could not be said with certainty that had the fall occurred at a different location, away from the employer's premises, the injuries would have been less serious.

Likewise, the act of driving fails this test of certainty. It cannot be said with certainty that had the Appellee's hypoglycemic seizure occurred away from work, his injuries would have been any less serious. The act of driving an automobile did not increase the Plaintiff's risk of experiencing a seizure or risk of an injury. He could have experienced the seizure while commuting home or while on a personal excursion.

Ledbetter provided the basis for determining when to apply the personal risk doctrine. If it cannot be said with certainty that had the accident occurred at a different location, away from the employer's premises, the injuries would have been less serious, then the personal risk doctrine

should apply. In this case, it cannot be said with certainty that had the Plaintiff been driving his car home from work, that his injuries would have been less serious or more serious. The operation of a motor vehicle in this case is simply an insufficient basis for satisfying the "arising out of" element of Section 301.

CONCLUSION

The Appellees' arguments are not so much a defense of the Court of Appeals' decision as they are an affront to the "arising out of" element of Section 301. At the heart of this case is whether or not the "arising out of" language of Section 301 means anything. The Plaintiff-Appellee's interpretation of *Ledbetter* repudiates the two-step analysis required for awarding Workers' Compensation benefits. In order to remain faithful to the statutory language of Section 301, and to the *Van Gorder* precedent, liability should not be found on the facts of this case.

WHEREFORE, for the above reasons, the Appellant, Total Petroleum, Inc., respectfully requests that the Michigan Supreme Court reverse the decision of the Michigan Court of Appeals and reinstate the decision of the Workers' Compensation Appellate Commission.

Respectfully submitted,

Dated: May 6, 2002

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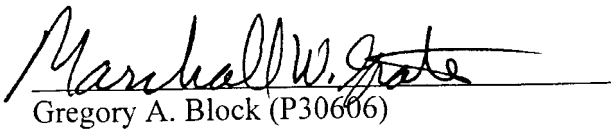

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